STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
August 10, 2010

In the Matter of T. A. JOHNSON and S. R. PAINE, Minors.

No. 294881
Wayne Circuit Court
Family Division
LC No. 95-328733-NA

Before: K.F. KELLY, P.J., and WILDER and GLEICHER, JJ.

PER CURIAM.

Respondent, the biological mother of the involved children, appeals as of right a circuit court order terminating her parental rights pursuant to MCL 712A.19b(3)(c)(*i*), (g), (i), and (j). We affirm.

This child protective proceeding arose when petitioner filed a permanent custody petition in July 2006. The petition initially referenced a December 1996 Wayne Circuit Court order that had terminated respondent's parental rights to three older children. The petition then listed many allegations that focused on concerns regarding respondent's mental stability and ability to maintain stable housing. For example, the petition averred that in June 2006 respondent had departed from a homeless shelter after "accus[ing] the staff and other shelter participants of poisoning the infant's formula and putting something into the laundry which caused her to become sick." During respondent's abbreviated stay at the shelter, she reportedly exhibited "irrational" behavior "with several outbursts." According to the petition, since leaving the shelter respondent had "moved to at least 6 different locations" and had "admitted to staying with strangers with the children." The petition additionally asserted that in July 2006 respondent "accused prior landlords of sabotaging the homes in attempts to harm her and the children. She reported that the landlord would paint the walls in the home with formaldehyde." Also in July 2006, respondent expressed to protective service workers that she had "a prior diagnos[is] of depression . . . [for] which medication was prescribed. However, she could not remember the medication or the time frame."

In August 2006, the circuit court exercised jurisdiction over the two involved children on the basis of respondent's admissions to many of the petition's allegations. Petitioner agreed to drop its request for permanent custody and permit respondent to participate in a reunification plan. The circuit court ordered that respondent participate in a treatment plan consisting of parenting classes, individual therapy, psychiatric and psychological evaluations, substance abuse treatment for alcohol and marijuana usage, supervised parenting times, and maintenance of a legal income source, housing, and contact with petitioner. Over the more than 2-1/2 years

between the court's exercise of jurisdiction and petitioner's filing of a supplemental permanent custody petition in March 2009, respondent made sporadic, but ultimately insubstantial, progress toward completing the elements of her treatment plan. In September 2009, after a two-day termination hearing, the circuit court terminated respondent's parental rights.

Respondent initially asserts on appeal that the circuit court violated her constitutional due process rights by depriving her of notice of the preliminary hearing, which respondent consequently did not attend. We review de novo the legal issues of constitutional law and court rule interpretation inherent in respondent's argument. *In re Rood*, 483 Mich 73, 91 (opinion by Corrigan, J.); 763 NW2d 587 (2009); *Johnson Family Ltd Partnership v White Pine Wireless, LLC*, 281 Mich App 364, 387; 761 NW2d 353 (2008). Respondent's lack of notice claim qualifies as unpreserved because she did not raise the claim of error at any point in the child protective proceedings; we thus review this claim only to ascertain whether any plain error affected respondent's substantial rights. *In re Williams*, 286 Mich App 253, 274; 779 NW2d 286 (2009), citing *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999).

The Michigan Court Rules, in MCR 3.965(B)(1), aim to protect the procedural due process rights of parents or other legal custodians with respect to preliminary hearings in child protective proceedings. Pursuant to MCR 3.965(B)(1),

> The court must determine if the parent, guardian, or legal custodian has been notified, and if the lawyer-guardian ad litem for the child is present. *The preliminary hearing* may be adjourned for the purpose of securing the appearance of an attorney, parent, guardian, or legal custodian or *may be conducted in the absence of the parent, guardian, or legal custodian if notice has been given or if the court finds that a reasonable attempt to give notice was made*. [Emphasis added.]

Here, the notice discussion proceeded as follows at the July 26, 2006 preliminary hearing:

> *Referee*: . . . And has the mother of these children, . . . been notified of these proceedings?
>
> *Children's Protective Services (CPS) Worker*: I was—her whereabouts currently are unknown to me. Ms. Vickerson [a former foster mother of respondent, with whom one of respondent's children had been placed] did inform me that she'd talked with her over the phone and informed her.
>
> * * *
>
> *Referee*: Okay. Now you mentioned—who was it that notified the mother?
>
> *CPS Worker*: Mrs. Vickerson, the person that the infant is staying with.
>
> * * *

> *Referee*: So, the foster care provider knows—is in touch with the mother. Does she know her whereabouts?
>
> *CPS Worker*: She does not have an address. Just kind of using the various telephone numbers that she had, she was able to talk with her.

Near the close of the preliminary hearing, the referee declared, "Well, you have notice to the mother," a finding echoed in the postpreliminary hearing order entered by the referee: "Notice of the Hearing was given as required by law."

The scant record in this regard constrains us to conclude that respondent did not receive adequate or reasonable notice of the preliminary hearing in conformity with MCR 3.965(B)(1). The brief exchange on the record, which came in the form of hearsay, did not offer any specific details concerning when respondent may have heard information by telephone about the petition in this case and the preliminary hearing, or what specific information the second-hand source supplied respondent about the preliminary hearing on the petition. We deem the vague and abbreviated record showing insufficient to satisfy MCR 3.965(B)(1) and respondent's right to procedural due process at the outset of these child protective proceedings. *In re Rood*, 483 Mich at 107-111, 118 (opinion by Corrigan, J.), 123-124 (Cavanagh, J., concurring in part), 126-127 (Young, J., concurring in part). Nonetheless, we conclude that the initial lack of satisfactory notice to respondent, although a plain error, did not qualify as prejudicial to her substantial rights. Unlike the respondent in *In re Rood*, *id*. at 114-115, respondent in this case appeared at 16 of the 18 subsequent hearing dates, had representation by counsel at all the hearings, and petitioner offered respondent assistance with many services. And importantly, respondent fails to explain in her brief on appeal any manner in which the improper preliminary hearing notice caused her any prejudice. In summary, the early lack of notice did not affect the outcome of the child protective proceedings. *Carines*, 460 Mich at 763-764.

Respondent also complains that the circuit court neglected to comply with MCR 3.965(C)(4)(b), which sets forth that "[i]f the child has been placed in a relative's home, . . . the court must order the [Department of Human Services] to perform a home study with a copy to be submitted to the court not more than 30 days after the placement." Again, respondent raised no timely objection to petitioner's placement of one of respondent's children with the child's paternal grandmother at the outset of the proceedings. Even assuming that a lack of compliance with MCR 3.965(C)(4)(b) amounted to plain error, the error did not affect respondent's substantial rights. Respondent entirely omits an explanation of how the home study omission affected the outcome of the proceedings, and we discern no effect or impact on the circuit court's ultimate termination of respondent's parental rights. *Carines*, 460 Mich at 763.

Respondent additionally contests the propriety of the circuit court's termination ruling. The petitioner bears the burden of proving a statutory ground for termination by clear and convincing evidence. MCL 712A.19b(3); *In re Trejo*, 462 Mich 341, 350; 612 NW2d 407 (2000). Once a statutory ground for termination is established by clear and convincing evidence, the circuit court must order termination if "termination of parental rights is in the child's best interests." MCL 712A.19b(5). We review for clear error a circuit court's findings of fact. MCR 3.977(J); *In re Trejo*, 462 Mich at 356-357. "A finding is clearly erroneous if although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm

conviction that a mistake has been made." *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989) (internal quotation omitted).

Clear and convincing evidence supported the circuit court's decision to terminate respondent's rights under MCL 712A.19b(3)(c)(*i*), which authorizes termination when "182 or more days have elapsed since the issuance of an initial dispositional order, and the court, by clear and convincing evidence, finds" that "[t]he conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age." The conditions leading to adjudication in this case included respondent's prior terminations, her lack of housing, and her unstable mental condition. A psychiatric evaluation diagnosed respondent as having bipolar disorder, and she was prescribed Depakote to help with her mood swings. Psychologist Dr. Oluwa Davis, respondent's most recent therapist, testified at the termination hearing that he had begun counseling respondent around June 2008 to address "the loss of her children and the difficulty that she was experiencing in finding a stable living circumstance," "[a]nd [that] constant conflicts in relationships was her primary issue." Although the court ordered respondent to attend weekly therapy, she met with Dr. Davis on average once a month. Dr. Davis's records reflected that (1) in February 2009, respondent reported "improved mental status . . . [and] increased compliance with meds," (2) Dr. Davis did not meet with respondent in March 2009 or April 2009, (3) in May 2009, Dr. Davis characterized respondent "as being a danger to others for ideations and making no progress," (4) in June 2009, respondent appeared angry and "report[ed] that she is very unstable and capable of striking out angrily due to constant pressures of others [on] whom she is forced to rely," and (5) in July 2009, respondent exhibited "[s]imilar kind of behavior." Dr. Davis expressed that he had no concerns about respondent's ability to care for her children, explaining that the loss of the children had caused respondent the most frustration, and that "with treatment," a parent suffering from bipolar disorder can parent their children. However, Dr. Davis cautioned that respondent "needs ongoing counseling and therapy."

Other testimony at the termination hearing summarized that respondent inconsistently attended supervised parenting times with her children throughout most of the lengthy child protective proceedings, although she did visit more regularly in May 2009 and June 2009, and that when respondent attended visits she frequently lashed out at the children's foster parents and other adults. The accounts of one child's foster mother and a parenting time supervisor reflected that respondent repeatedly hurled angry accusations at other adults she encountered, sometimes in front of her child; insinuated that she would harm her case worker if she lost her children; and, in general, just seemed "so angry all the time." With respect to respondent's other treatment plan components, her current case worker described that (1) she completed parenting classes, although the worker opined that on the basis of his observations of a couple of visits and his conversations with respondent's visitation supervisor, he disbelieved that respondent had benefited from the parenting classes; (2) respondent participated in psychological and psychiatric evaluations, which recommended counseling and medication for her bipolar disorder; (3) several counseling agencies had terminated respondent's counseling sessions due to nonparticipation, before she began seeing Dr. Davis; (4) respondent had neglected to complete a substance abuse program, and infrequently participated in drug screens; (5) respondent, who had a "constant history of transience," remained homeless at the time of the termination hearing; and (6) respondent had no confirmed current source of income, although she did hold multiple, short-term fast food jobs in recent years.

In summary, clear and convincing evidence established that the conditions leading to the children's adjudication continued to exist at the time of the termination hearing, despite respondent's receipt of various services. And in light of respondent's minimal sustained progress over the course of the almost three years that she had to participate in services while her children remained in foster care, clear and convincing evidence also established no reasonable likelihood that respondent could rectify the conditions in a reasonable time given the children's ages. Furthermore, the evidence detailed above clearly and convincingly proves the ground for termination in MCL 712A.19b(3)(g), that "[t]he parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age." We conclude that the circuit court did not clearly err when it invoked these statutory grounds in support of its termination ruling.[1]

Respondent lastly suggests that the circuit court neglected to make a best interests determination in conformity with MCL 712A.19b(5). However, the record reveals that the circuit court made findings and conclusions concerning the children's best interests in its bench ruling before making conclusions about the statutory grounds warranting termination:

> But there's [sic] been a whole host of things that have prevented these children from moving forward and the primary concern of this Court is the best interests of these children.
>
> And the best interests of these children has [sic] not been served by keeping them as wards for the three years.
>
> The children do need stability. We're fortunate these children don't have any special needs, but in order for them to continue to prosper, they need some stability.
>
> And the children have been placed in the care of the relatives so that's a fortunate scenario for them as well.
>
> Based upon the length of time the children have been in care, the fact that the mother has not made significant progress on her treatment plan, the fact that the conditions that existed at the beginning of this case, continue to exist and there

[1] Because only one ground for termination need exist, we decline to consider the alternate grounds cited by the circuit court. To the extent that respondent characterizes as inadequate petitioner's provision of services, the record simply does not substantiate her claim. Even assuming that petitioner failed to follow through with two housing referrals, it appears highly unlikely that "respondent would have fared better if the worker had offered those additional services," in light of the extended period of time that the court afforded respondent to participate in multiple housing and other services and the absence of any proof that respondent would have secured a stable residence with greater assistance from petitioner. *In re Fried*, 266 Mich App 535, 543; 702 NW2d 192 (2005).

> is no reasonable likelihood that they're going to change anytime soon, the Court is compelled to terminate her parental rights.
>
> The fact of the matter remains is [sic] that I don't see anything happening in the near future.
>
> I don't see any changes. I just don't and we've given three years. . . . I don't think really in good conscious [sic], I don't see how I could give her more time.

Abundant evidence of record supports the circuit court's best interests findings, and consequently, we detect no clear error in these findings. The evidence did show that respondent and her oldest child shared a loving bond, but the entirety of the record concerning respondent's minimal progress over the course of three years amply support the circuit court's best interest ruling.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Kurtis T. Wilder
/s/ Elizabeth L. Gleicher